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SUMMARY

Amicus contends that contemnors who are tried pursuant to alleged violations of federal labor injunctions, including those arising out of the Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §141 et. seq., are entitled to jury trials. This right to fact-finding by a jury derives from historical lessons, from the clear statutory language of Section 3692 of Title 18 of the United States Code, and from basic constitutional protections.

During the nineteenth and early twentieth century, the federal courts had jurisdiction to issue injunctions against unions involved in labor disputes. The issuance of these injunctions, and their enforcement through judge-tried contempts, by-passed the common law right to a trial by jury in conspiracy cases. The judge made the law, evaluated the factual evidence, applied his law and sentenced the defendant. This combination of functions abrogated the accepted division of legal responsibilities and, by the end of the 19th century, provoked considerable criticism. Labor leaders, judges, lawyers, and finally legislators recognized the divisiveness engendered by these injunctions and their enforcement.

In 1932, Congress enacted the Norris-LaGuardia Act, 29 U.S.C. §101 et. seq., severely limiting the power of the federal courts to issue injunctions against workers in labor disputes, and guaranteeing in Section 11 of that statute the right to a jury in contempt trials arising out of these injunctions. The Labor-Management Relations Act, passed by the Eightieth Congress in 1947, authorized the federal courts to issue injunctions in order to enforce findings by the NLRB of probable unfair labor practices. Employers, rather than proceeding under the stringent requirements of the Norris-LaGuardia Act, could rely on the NLRB to seek injunctions under the laxer standards of the Taft-Hartley Act. Without any substantial debate, Congress inadvertently failed to extend the jury trial right to contempts arising out of these injunctions.

However, in 1948, the same Congress, in revising the federal criminal code, rectified this omission by its enactment of 18 U.S.C. §3692. This new statute, in providing for jury trials in all cases of contempt arising under the laws of the United States governing the issuance of injunctions in cases involving labor disputes, makes evident the intent of the legislators to extend the jury right beyond the cases arising under the Norris-LaGuardia Act. If interpreted as its plain words require, Section 3692 clearly extends the jury right to contempt cases arising under the Taft-Hartley Act, while not defeating the purposes of that Act. Nor does such an interpretation conflict with Section 10(h) of the National Labor Relations Act as incorporated into the Taft-Hartley Act. Extension of the right to jury trials to Taft-Hartley derived contempt cases does not limit the equitable jurisdiction of the federal courts. It merely places fact-finding responsibility in contempt cases upon jury rather than judge. Section 3692, therefore, must be interpreted to guarantee the right to jury trials in contempt cases arising under both the Norris-LaGuardia and the Taft-Hartley Acts.

In the event that this Court concludes that there is no statutory right to a jury trial, however, the constitutional issue must still be faced. Petitioners are constitutionally entitled to a jury trial for two reasons. First, the $25,000 fine imposed upon petitioner union renders the offense non-petty pursuant to 18 U.S.C. §1, in which Congress has explicitly drawn a line between petty and serious offenses. This statute contains no exception for fines imposed upon unions and should be strictly construed.

Second, although this Court has indicated that conduct constituting criminal contempt is not inherently serious, the possibility remains that particular contemptuous conduct might be so serious as to require a jury trial. In the instant case, petitioner's conduct, consisting of a combination of workers to impose a boycott, constituted the common law offense of criminal conspiracy -- an offense which was malum in se and triable by jury as of right. Even though this common law regulation of union activities has been supplanted by a comprehensive statutory system of regulation, the right to jury trial

still obtains. Whether the proceeding takes the form of an ordinary prosecution or a prosecution for contempt, the underlying conduct is equally serious. Petitioners therefore are constitutionally entitled to a jury when tried for contempt of the labor injunction issued in the instant case.

INTRODUCTION

This case arises out of a long and bitter strike encompassing the entire San Francisco area. In January, 1970, Local 21 of the International Typographical Union, AFL-CIO, went on strike against California Newspapers Inc. in Marin County, California.

In attempts to prevent deliveries to the struck employer, Local 21 established picket lines which ranged over two counties for a period of four years. Members of at least four other unions actively and courageously supported the striking union. Their sympathy for Local 21's cause apparently made these other workers willing to defy their own employers, and subsequently, a federal court order.

Management was similarly committed to its own cause. Rather than settle the dispute, the newspaper chose to withstand a ten month strike.

The factual situation involved in the instant case is typical of those cases which raise questions concerning labor's right to a jury trial in contempt proceedings. By their very nature, charges of contempt, particularly criminal contempt, tend to arise out of bitter strikes such as this one. Contempt trials will occur when a union and its members feel so strongly about the issues involved that they undertake actions which at least arguably violate a Court's order. They will occur when management or the National Labor Relations Board is willing to risk the years of bitterness engendered by fines and jail terms imposed upon unions and their members. Such contempt trials will arise when the parties are so firmly committed to their positions that for a time they are virtually at war.

The instant case and other similar ones are an outgrowth of the worsening economic conditions in this country. As the economy has moved into a deeper recession, union members' real wages have fallen and some workers have lost their jobs entirely. Many companies, faced with increased foreign and domestic competition and with growing uncertainty over their economic future, have been unwilling to grant wage increases or have demanded job-cutting efficiency gains. Labor relations,

which appeared calm during the last decade, again have become turbulent.[1]

During a time of particular economic hardship and devisiveness in the field of labor relations, it is particularly incumbent upon this Court to reaffirm the fundamental rights for which labor fought so hard in the past. The right to a jury trial in contempt proceedings is one of these rights, guaranteed both by the statutory wording and legislative history of §3692 of Title 18 of the United States Code, and by the Constitution of the United States itself.

1. In general, the National Labor Relations Board only infrequently brings contempt proceedings. "Until 1964, the peak years were 1941, 1942, and 1943. In 1941 and 1943, the Board filed contempt petitions in fifteen and thirteen cases, respectively, and in 1942, eleven cases were decided, five settled and ten were pending adjudication. The next twenty years were a period of remarkable inactivity. While unfair labor practice cases and court decrees continued to increase in number (and there is nothing to indicate a decrease in the incidence of violation of decrees), the Board filed, on the average, only three contempt cases per year and none at all in 1946, 1948, 1949, and 1955. Beginning in 1964, the number of petitions dramatically increased: fourteen in 1964, twelve in 1965, eighteen in 1966, twenty in 1967, twenty in 1968, twenty-three in 1969, twenty in 1970 and seventeen in 1971," BARTOSIC & LANOFF, Escalating the Struggle Against Taft-Hartley Contemnors, 39 U. CHI. L. REV. 255, 257 (1972).

I. LEGISLATIVE HISTORY AND THE STATUTORY LANGUAGE OF 18 U.S.C. §3692 GRANT THE RIGHT TO A JURY TRIAL IN CONTEMPT PROCEEDINGS ARISING OUT OF INJUNCTIONS ISSUED PURSUANT TO THE TAFT-HARTLEY ACT

A. History and the Statutory Development of the Labor Law Demonstrate the Justification for Selection of the Jury as Fact-Finer in Labor Contempt Cases.

Current turbulent labor relations are analagous to the bitter struggles in this country's past which led to expanded statutory protection of the right to jury trials in labor contempt cases. An understanding of the historical roots of this protection illuminate both the purposes of past statutes as well as those purposes furthered today by the statutory provision for a jury trial in any contempt arising out of a labor injunction issued under the laws of the United States. 18 U.S.C. §3692 (1970).

1. The Pre-Norris-LaGuardia Act Period

During the nineteenth and early twentieth century, the efforts of workers to gain a greater measure of economic protection through self-organization and concerted activity met determined opposition from employers and often, as well, from the government and the courts.

Among the worst forms of combined opposition to organizing efforts was the indiscriminate issuance and enforcement of labor injunctions. Any action taken by workers to promote their interests, including organizing, striking, picketing, handbilling, and speechmaking, often was enjoined by the courts at the whim of the employer. In their classic study, The Labor Injunction, Frankfurter and Greene described the abuses which labor injunctions engendered and the outrage which they provoked among workers and sympathetic citizens.[2]

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2. See generally, F. FRANKFURTER & N. GREENE, THE LABOR INJUNCTION (1930).

In recent decisions, this Court has summarized the use of injunctions during this early period:

> In the early part of this century, the federal courts generally were regarded as allies of management in its attempt to prevent organization and strengthening of labor unions; and in this industrial struggle the injunction became a potent weapon that was wielded against the activities of labor groups. The result was a large number of sweeping decrees, often issued ex parte, drawn on an ad hoc basis without regard to any systematic elaboation of national labor policy. Boys Market, Inc. v. Retail Clerks Local 770, 398 U.S. 235, 250 (1970).

When workers appeared to violate these injunctions, employers would rush to court for contempt citations, hoping that jail sentences or fines would break the strike.[3] By the end of the last century, criticism of the arbitrary issuance, and even more arbitrary enforcement of these injunctions came from all sides. Critics focused upon the fact that the judge who issued the injunction also tried the facts and determined the sentence.

Legal experts such as the President of the American Bar Association strongly condemned the unfairness of the trial judge acting as fact-finder in such contempt proceedings.[4] Judge Henry Clay Caldwell, a presiding judge for the Eighth Circuit, noted in 1899:

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3. See C. SWAYZEE, CONTEMPT OF COURT IN LABOR INJUNCTION CASES 100 (1935).

One of the major functions of the injunction-contempt system was to bypass juries, which, in the last quarter of the nineteenth century often refused to return convictions in criminal conspiracy cases arising from labor disputes. Nevertheless, in In re Debs, 158 U.S. 564 (1895) this Court ruled that this deliberate bypass of trial by jury was constitutional, thereby necessitating a legislative approach.

4. F. FRANKFURTER & N. GREENE, supra note 2, at 57 n. 40.

> . . . in proceedings for contempt of an alleged violation of the [labor] injunction, the judge is the lawmaker, the injured party, the prosecutor, the judge and the jury. It is not surprising that uniting in himself all these characters, he is commonly able to obtain a conviction. Trial by Judge and Jury, 33 Am.L.Rev., 321, 327 (1899).

Similarly, American Federation of Labor leader Samuel Gompers said that criminal contempt charges were worse than the old labor conspiracy charges, for the contempts were not tried by a jury, but rather were a "purely personal trial by a judge, a jeopardy depending on his peculiar notion of the fractured dignity of his court and his sympathy with one or the other of the parties at issue."[5]

Legislators at the time were especially concerned that contempt trials by judges were undercutting the legitimacy of the courts. Judge Clark of North Carolina was asked by the Commission on Industrial Relations in 1915 whether such trials by the judge had been "one of the causes of social unrest in the United States?" He answered, "Yes,sir; and undoubtedly will be more so, unless it is remedied." F. Frankfurter & N. Greene, supra at 57. Senator Walsh of Montana suggested that requiring juries in such contempt cases would strengthen the hand of the courts:

> An injunction has issued in an industrial dispute. It is charged that it has been violated. If the judge himself assumes to determine whether it has been or has not been, he can scarcely hope to make a decision that will not subject him to the charges if he finds the prisoner guilty, of subserviency to the capitalistic interests of hostility to organized labor, or if he shall acquit, to the pusillanimity of the ambition of the demagogue. In either case his court suffers in the estimation of no inconsiderable body of citizens. How

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5. 4 AMERICAN FEDERATIONIST (1897).

> much wiser it would be to call in a jury to resolve the simple question of fact as to whether the defendant did or did not violate the injunction?. . . Their verdict would silence caviling and strengthen in the minds of the people the conviction that the courts are indeed the dispensers of justice and not engines of oppression. 51 Cong. Rec. 14369 (1914) (Senate debate on Clayton Act)

Therefore, beginning in 1896, legislators at both the national and state levels introduced bills guaranteeing the right to a jury trial where contempt of a labor injunction was charged. Frequently, when states passed these bills, the courts would declare them unconstitutional or unwarranted intrusions by the legislature into inherent judicial power. See, Nichols v. Judge of Superior Court, 130 Mich. 187, 89 N.W. 691 (1902); State ex inf. Crow, Atty. Gen. v. Shepherd, 177 Mo. 205, 76 S.W. 79 (1903); Burdett v. Commonwealth, 103 Va. 838, 48 S.E. 878 (1904); Walton Lunch Co. v. Kearney, 236 Mass. 310, 128 N.E. 429 (1920).

In Section 22 of the Clayton Anti-Trust Act of 1914, 38 Stat. 738 (recodified in 1948 to 18 U.S.C. §§4402, 3691), Congress provided the first federal guarantee of the right to a jury trial in certain contempt cases arising out of labor injunctions. Specifically in those cases, where an offense was both a criminal offense and a violation of an injunction, the accused had a right to a trial by a jury of his peers if he were tried for contempt of the injunction.

Two lower federal courts declared even this limited reform unconstitutional. Michaelson v. United States ex rel. Chicago, St.P.,M.&O. Ry., 291 F.940 (7th Cir. 1923); In re Atchison, 284 F.604 (S.D. Fla. 1922).

2. *The Norris-LaGuardia Act*

In enacting the Norris-LaGuardia Act, 29 U.S.C. §101 et seq. in 1932 (originally enacted as Act of March 23, 1932, ch. 90, 47 Stat. 70), Congress recognized the severe need for major reforms in the area of labor injunctions and resulting contempt proceedings. In the House, Representative Schneider described these results of bench trials for labor contempts:

> The judge whose order or decree had been violated, if in fact it had been violated. . .became the prosecuting officer, the jury and the judge all rolled up in one.
>
> He was the complainant, he was the prosecutor, he judged the facts without a jury, convicted the accused and sentenced him to jail for contempt of court. And these judges, setting at naught the most precious rights which ages of progress and struggle had made the heritage of all, expected the people to have anything but contempt for them and their orders. 75 Cong. Rec. 5515 (1932) (House debate on the Norris-LaGuardia Act).

Senator Norris, the sponsor of the Act, set forth even more graphically the need for a jury trial in contempts arising out of labor injunctions:

> And suppose one of these defendants disobeyed this injunction? He would not be violating any State law! He would only be doing what every human being has a right to do! No statute of any State or the Federal Government would preclude him from giving full publicity to all of the facts. But, under this judge-made law, a new statute was put in force--not by the legislature of the State, not by anyone having authority to enact a statute, but by the judge sitting on the Federal bench.
>
> And let us suppose, too, that for a violation of this order, one of the defendants was arrested. Where would he be tried? Would it be in the courts of the State where the offense is alleged to have been committed? No. It would be before the same judge who made the law. The judge who, acting as a legislator, made the law .... In such a case the defendant would have committed a crime as defined by this arbitrary law in the shape of an injunction--not a crime under any Federal law, but a crime made so by an arbitrary order of a judge, who is not supposed, under our Constitution and laws, to have any

> legislative authority. And if, when he was arrested, there was a dispute as to whether he has violated the order of the judge and thus committed a crime, would he have the right to law his case before a jury of his peers? Would the constitution and the laws of the State where the alleged offense was committed control in such a trial? No. No jury could sit in that case. Who would be the jury? The answer is, the same person who fixes the penalty. 75 Cong. Rec. 4507 (1932) (Senate debate on the Norris LaGuardia Act)

The new legislation provided that no federal court had jurisdiction to issue an injunction in any case involving or growing out of a labor dispute,[6] unless the employer met certain precise substantive standards enumerated in the Act. See 29 U.S.C. §101 et seq. Even where these standards were met, the federal court could grant injunctive relief only if it fulfilled numerous procedural safeguards designed to protect the rights of unions and workers.[7] At the time, any injunction issued by a federal court in a case involving a labor dispute had to fulfill these substantive and procedural requirements.

Recognizing the past history of contempt trials in labor cases, Congress specifically provided in Section 11 for a trial by jury in any contempt[8] proceeding arising under the new Act. [29 U.S.C.

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6. "Labor dispute" was defined broadly to cover almost any type of labor-management controversy. 29 U.S.C. § 113 (c) (1970) (originally enacted as Act of March 23, 1932, Ch. 90, § 13, 47 Stat. 70).

7. E.g., 29 U.S.C. § 107 requires a hearing on notice in open court with the opportunity for defendants both to cross-examine the witnesses against them and to present testimony in their own behalf.

8. Section 11 had two exceptions to this jury trial requirement: "Provided, That this right shall nor apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior misconduct, or disobedience of any officer of the court in respect to the writs, orders, or processes of the court." Ch. 90, § 11, 47 Stat. 73.

§III (1946 ed.); Act of March 23, 1932, ch. 90, §II, 47 Stat. 73] In enacting this provision, Congress intended to avoid both the unfairness and the appearance of unfairness of bench trials for labor contempts. The legislators embodied in Section II of the Norris-LaGuardia Act an historic restoration of the protection which labor had enjoyed before criminal conspiracy prosecutions had been replaced by injunctions and summary contempt: in all cases where the federal courts could issue labor injunctions, an accused contemnor was entitled to a trial by a jury of his peers.[9]

3. *The National Labor Relations Act*

In 1935, Congress enacted the National Labor Relations Act (NLRA or the Wagner Act, 29 U.S.C. §151 et. seq.,49 Stat. 499) guaranteeing to workers the right to join unions, to strike and to engage in certain other protected activity. The new Act outlawed five specific "unfair labor practices" by employers, and established the National Labor Relations Board (NLRB) which was to enforce the Act by seeking court orders enforcing its decisions in the United States Courts of Appeals. Section 10(h) of the NLRA granted the Courts of Appeals equitable jurisdiction to enforce the NLRB's decisions and provided that in the exercise of this function "the jurisdiction of courts sitting in equity shall not be limited by [the provisions of the Norris-LaGuardia Act]." 29 U.S.C. §160(h).

While Section 10(h) prevented the application of the Norris-LaGuardia Act to Board orders issued on behalf of workers, it had no effect on the availability of injunctions against workers. Thus, the historic gain embodied in Section II of the Norris-LaGuardia Act was unaffected by the new Section 10(h) or by any other provision of the new NLRA. As had been true before, in all cases in which federal injunctions were issued against workers, those accused of contempt had the right to a trial by a jury of their peers.

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9. With the exceptions cited in note 8 supra.

4. The Taft-Hartley Act

In the 1947 Labor-Management Relations Act (Taft-Hartley Act), 29 U.S.C. §141 et seq., 61 Stat. 136, the Eightieth Congress once again expanded the jurisdiction of the federal courts to allow them to issue injunctions against workers in labor disputes. This Act authorized federal injunctions in many of the situations in which employers had obtained them prior to the Norris-LaGuardia Act.

For example, in the pre-Norris-LaGuardia period, the United States government sought and obtained federal injunctions against strikes which purportedly threatened the public health and safety. See, e.g., In re Debs, 158 U.S. 564 (1895). Under Sections 206 through 210 of the new Taft-Hartley Act, 29 U.S.C. §§176-180, the Government again could seek injunctions against strikes which purportedly threatened the national health and safety.

Similarly, in the pre-Norris-LaGuardia period, many of the most important injunction and contempt proceedings involved federal court attempts to halt secondary boycotts. See, e.g., Gompers v. Bucks Stove and Range Co., 221 U.S. 418 (1911); Loewe v. Lawlor (Danbury Hatters), 208 U.S. 274 (1908); and Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n., 274 U.S. 37 (1927). Under Sections 8(b)(4) and 10(l) of the new Taft-Hartley Act, the National Labor Relations Board was required to seek injunctions against such secondary boycotts. 29 U.S.C. §§158(b)(4), 160(l).

Finally, as one more example, in the pre-Norris-LaGuardia era employers sought and obtained injunctions against mass picketing. See, e.g., American Steel Foundaries v. Tri-City Trades Council, 257 U.S. 184 (1921). Under Sections 8(b)(1) and 10(j) of the new Act, the NLRB was authorized to do the same. 29 U.S.C. §§158 (b)(1), 160(j).

In view of these newly broadened powers of the federal courts to issue injunctions against workers involved in labor disputes, employers no longer had to seek injunctions themselves under the stringent provisions of the Norris-LaGuardia Act. Rather, they could file unfair labor practice charges with the NLRB and rely on the Board to seek the injunction for them under the more lax standards of the Taft-Hartley Act. As the United States Court of Appeals for the First Circuit noted, with these new Taft-Hartley injunctions, the Norris-LaGuardia injunction

became an "obsolescing kind of injunction." In re Union Nacional de Trabajadores 502 F. 2d. 113,119 (1st Cir. 1974)

For a year, from 1947 until 1948, there was no general statutory right to a jury trial in contempt proceedings arising out of these new labor injunctions. Section 11 of the Norris-LaGuardia Act by its terms provided for a right to a jury trial only for casea arising under that Act. 29 U.S.S.§111 (1946ed.). 47 Stat. 72, § 11.

Such an historic limitation of the right to a jury trial was not intended by the Eightieth Congress. With the broad new range of available injunctions, failure to provide for such a jury right created grave dangers for the rights of the accused and for the legitimacy of the courts. However, none of the Committee reports on the Taft-Hartley bill suggests that the legislators intended to re-establish bench trials in contempts arising under the new form of injunctions.[10] In their extensive comments upon the bills, neither Senator Taft nor Representative Hartley suggested any such change. Those friends of labor who opposed the bill also did not understand it to deprive accused contemnors of this hard-won right.[11]

Section 10(h) of the new Taft-Hartley Act of course provided that "the jurisdiction of courts sitting in equity shall not be limited by [the provisions of the Norris-LaGuardia Act] ." 29 U. S. C. § 160(h). This section[12], however, was simply re-enacted from the 1935 N.L.R.A., and was seen as a routine provision which merely granted the Courts of Appeals jurisdiction to enforce Board orders. See, e.g., H.R. REP. No. 510, 80th Cong., 1st Sess. 57 (1947), and see infra, at page 23. No one in the 1947 Congress suggested that Section 10(h) deprived labor of its right to a jury trial in contempts arising out of the new Taft-Hartley injunctions.

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10. See H.R. REP. No. 245, 80th Cong., 1st Sess. (1947); H.R. REP. No. 510, 80th Cong., 1st Sess. (1947).

11. Even the unsuccessful Ball amendment to the Labor-Management Relations Act, which if passed would have granted jurisdiction to the federal courts to issue injunctions on the petition of private employers, would have retained the jury trial guarantee for contempt prosecutions. See 93 CONG. REC. 4757 (1947) (Text of Ball Amendment, S. 1126); 93 CONG. REC.

12. See page 23 , infra. for a complete discussion of Section 10(h) and its effect on labor's jury trial right in contempts arising out of labor injunctions.

In short, the Eightieth Congress recreated a vast range of federal injunctions while inadvertently failing to provide for jury trials in contempt proceedings deriving from them. There is no other explanation for the thunderous Congressional silence: how could an important right occupying pages of debate only a few years before suddenly be waived without any substantial debate?

B. The Enactment of 18 U.S.C. § 3692 Affirmed the Right to a Jury Trial in Labor Contempt Proceedings Involving Injunctions Arising Under the Taft-Hartley Act.

The Eightieth Congress quickly corrected its inadvertent omission of the jury trial protection in labor contempt proceedings. In 1948, Congress substantially overhauled and modernized the federal criminal law. Act of June 25, 1948, ch. 645, 62 Stat. 683; see H.R. REP. No. 304. 80th Cong., 1st Sess. (1947). Representative Robison, who submitted the House Judiciary Committee Report, described the purpose of the act:

> [T]his bill [H.R. 3190] differs from the five codification bills which have preceded it on this calendar in that it constitutes a revision as well as a codification, of the federal laws relating to crimes and criminal procedure. 93 CONG. REC. 5048-5049 (1947) (House debate on the revision of the criminal code) (emphasis added).

As this Court has recognized, the 1948 Act was a "comprehensive revision" of the federal code.[13] Tinder v. United States, 345 U.S. 565, 569 (1953). The new Title 18 included broad changes in the punishments specified for federal crimes. See H.R. REP. No. 304, 80th Cong., 1st Sess. 2 (1947), and Tinder, 345 U.S. 565 (1953); In addition, the new Title 18

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13. The Bill was entitled H.R. 3190, "A Bill to Revise, Codify and Enact into Positive Law, Title 18 of the United States Code, Entitled 'Crimes and Criminal Procedure,'"

included important changes in criminal procedure. H.R. REP. No. 304, supra, at 8. The bill was intended to clarify the old law and to reconcile apparently conflicting provisions.[14]

One of the more important provisions of the new Title 18 was section 3692. This section replaced the old Section 11 of the Norris-LaGuardia Act [previously 29 U.S.C. § 111 (1946) and eliminated the explicit limitation of the jury right to cases arising under the Norris-LaGuardia Act. Prior to 1947, the Norris-LaGuardia Act was the only statute which granted the federal courts jurisdiction to issue injunctions in situations involving labor disputes, and therefore the only statute under which contempt cases involving employees might arise. Until the Taft-Hartley Act was passed, Section 11 of the Norris-LaGuardia Act had effectively guaranteed workers the right to a jury trial in all contempt cases arising out of injunctions granted in labor disputes. The Taft-Hartley Act, while neglecting specifically to guarantee jury trials in contempt cases, did provide for the issuance of injunctions in cases involving labor disputes[15] in which certain kinds of prohibited practices allegedly occurred.[16]

The new Section 3692 was much broader than Section 11 of the Norris-LaGuardia Act, providing a jury right for

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14. The House Report states that "Revision, as distinguished from codification, meant...[inter alia] reconciliation of conflicting laws...." H.R. REP. No. 304, supra, at 2.

15. The Taft-Hartley Act broadly defined "labor dispute" to include:

> ....any controversy concerning the terms, tenure, or conditions of employment, or concerning the association of representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proxinate relation of employer and employee. 29 U.S.C. § 152 (9) (emphasis added).

With the exception of the insertion of word "tenure," this is the same definition as appeared in Section 13 (c) of the Norris-LaGuardia Act, 29 U.S.C. § 113(c) (1970 ed.), 47 Stat. 73 (1932).

16. For the most part, Taft-Hartley injunctions issue in situations involving alleged "unfair labor practices." For example, under Section 10(j) and 10(l) of the Act, a United States District Court may enjoin, pending a Board hearing, conduct which purportedly constitutes an unfair labor practice.

any contempt arising out of injunctions granted pursuant to federal laws in cases involving labor disputes:

> In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed. 18 U.S.C. § 3692 (emphasis added)

As the United States Court of Appeals for the First Circuit stated, Section 3692 "is...not an ordinary statute, but one infused with a national policy arrived at after a painful and lengthy period of strike and debate." In re Union Nacional de Trabajadores, 502 F.2d 113, 118 (1st Cir. 1974)

In the 1948 Congressional debates and reports concerning the new Section 3692, there was no specific mention of the evident intent of the legislators to broaden the jury trial right to include contempt cases arising out of Taft-Hartley injunctions.[17] This is not surprising however, given the language of the section. By referring in the plural to "laws" governing these injunctions, Section 3692 makes clear the legislative intent to extend the jury trial right to contempt cases arising out of Taft-Hartley injunctions. This section merely reaffirmed the jury trial right of workers and labor organizers which had previously existed under the Norris-LaGuardia Act.

Such alleged unfair labor practices arise out of labor disputes and the labor disputes do not cease upon the filing of an unfair labor practice charge. The instant case, for example, arose out of a labor dispute between Typographers Local 21 and California Newspapers, Inc. The labor dispute, which eventually involved four other unions, did not cease when the U.S. District Judge issued an injunction because of alleged unfair labor practices.

In providing for the issuance of injunctions in such cases, the Taft-Hartley Act is a law of the United States governing the issuance of injunctions in cases growing out of labor disputes.

17. Since 1948, members of both the Senate and House Judiciary Committees have made clear that Section 3692 was in fact intended to insure that the jury trial protection was extended to

Furthermore, Section 3692 was passed in the context of a broad legislative mandate to enact new, positive law. The explicit provision for jury trials in contempt proceedings deriving from injunctions arising out of the laws of the United States governing labor injunctions reflects this broad mandate. Congress thus made clear its intention to provide "the same jury trial requirement as had previously attached to Norris-LaGuardia proceedings." In re Union Nacional de Trabajadores, 502 F.2d 113, 119 (1st Cir. 1974)

The burden is upon the Respondent here to demonstrate that Congress intended to exclude Taft-Hartley injunctions from the protections of Section 3692. As

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all criminal contempt prosecutions which grew out of injunctions issued in the context of labor disputes. In 1959, for example, Senator Kennedy and Senator Ervin offered an amendment, which successfully passed as Section 608 of the Labor Management Reporting and Disclosure Act (Landrum-Griffin Act), 29 U.S. C. § 528, 73 Stat. 541 § 608, providing for a jury trial in all cases of criminal contempt arising under that Act. In setting forth the purpose of this amendment, Senator Ervin explained:

> ...this amendment which I offer...merely provides for jury trials in criminal contempt cases. In that way it would harmonize with the pattern of law which has prevailed in labor controversies since 1914, when the Clayton Act was adopted.
>
> The purpose of the amendment is to make it plain that it is not the object of Congress in enacting the present bill into law to change the pattern of legislation which has been in effect since 1914. 105 CONG. REC. 6730 (1959) (Senate Debate on the Landrum-Griffin Act) (emphasis added).

Similarly, in the debates over the 1957 Civil Rights Act, Representative Smith of Virginia, who had been a member of the House Judiciary Committee which had overseen the 1948 revision of Title 18 and the enactment of 18 U.S.C. § 3692, argued persuasively that the right to a jury trial had been extended to injunctions under the Taft-Hartley Act. Representative Smith stated that the waiver provision in the Taft-Hartley Act did not supersede Section 11 of the Norris-LaGuardia Act and that regardless of any apparent conflict created by the enactment of Taft-Hartley, "In 1948 the Congress ...enacted Title 18 into positive law...[and] simply transferred [Norris-LaGuardia Act § 11, 29 U.S.C. § 111 (1946)] and broadened it." 103 CONG. REC. 8536 (1957). See also the further statements of Representative Smith at 103 CONG.REC. 8536-8537, 8684 (1957).

this Court has noted, the words of Title 18 enacted by the 1948 Act were not chosen lightly. Since there is no evidence of such a limited purpose, Section 3692 should be construed according to the broad meaning of its unambiguous language and should be held to provide the right to a jury trial to the Petitioners in this case. 18

C. The Purposes Furthered By 18 U.S.C. § 3692 Require That Persons Accused Of Violating A Taft-Hartley Injunction In The Context Of A Labor Dispute Be Entitled to A Trial By A Jury Of Their Peers.

1. The Purposes of 18 U.S.C. §3692 and of The Taft-Hartley Act May be Accommodated.

As discussed above, Section 3692 emerged from a painful fifty-year debate over the provision of jury trials in contempts arising out of labor injunctions. Congressmen, Senators, and others repeatedly stressed two overriding purposes for such protection. First, it was inherently unfair to workers to have the judge who issued the injunction try the contempt case, since in the contempt trial the judge, whose background and personal sympathies were most likely to be with employers, became the lawmaker, injured party, prosecutor, jury, and judge. Second, regardless of how fair the judge-tried contempt could be in fact, it appeared unfair to workers and undercut the legitimacy of the federal courts and their orders. 19

These two concerns, which are apparent throughout the fifty-year debate, were valid in 1948 and are valid in 1974. In both years, hundreds of thousands of workers were engaged in strikes. In both years, employers sought and obtain-

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18. Respondent suggests a technical limitation of Section 3692 to cases arising under the Norris-LaGuardia Act. As this Court has recognized in discussing another provision of the 1948 Act, "A highly technical distinction of this sort, which could easily have been spelled out, cannot be imposed on general words...." Tinder v. United States, 345 U.S. 565, 569-570 (1953).

19. See pages 8 ff. supra.

ed NLRB assistance in securing injunctions against certain prohibited practices. And in the most bitter strikes in both years, these injunctions were violated and the violaters were tried for civil and criminal contempts.[20]

In these contempt trials, it made little difference that the Board, rather than the employer, had sought the injunction. Because the Taft-Hartley Act clearly provided that only federal judges could issue injunctions and restraining orders requested by the Board, all of the dangers of judge-tried contempts were again present. It still was the judge's order which had been violated, and his dignity and authority which had been challenged. Again he was the lawmaker, prosecutor, jury, and judge. And if that judge imposed contempt penalties, his verdict still would appear unfair to the accused.

In ruling on the instant case, neither the Ninth Circuit nor the district court considered the policies which Section 3692 seeks to further. Both ignored this Court's admonition in Mastro Plastics Corp. v NLRB, 350 U.S. 270. 285 (1956), to consider the purposes of the respective statutes; both based their decisions primarily upon narrow and technical readings of the words of Section 3692.[21] The Ninth Circuit's only analysis of the statutory purposes consisted of the following two sentences:

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20. See pages 6-7 supra.

21. Even if one limits consideration to the words of Section 3692, the Ninth Circuit's decision is unpersuasive. That court held that the Taft-Hartley Act was included in "the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute." Hoffman v. I.L.W.U. Local 10, 492 F. 2d 929, 934 (9th Cir. 1974). As discussed above, the Taft-Hartley Act, according to its own terms, governs the issuance of injunctions and restraining orders in labor disputes. See note 17, supra. There is no justification for the Ninth Circuit's extremely narrow reading of the broad words which deliberately were chosen by the Reviser and Congress in 1948. See supra.

> The purposes of the Norris-LaGuardia Act to limit and restrict the equitable powers of the courts to intervene in labor disputes between private employers and unions are not the same as the powers involved in the administrative scheme of the Labor-Management Relations Act and its amendments. There is no reason to believe that Congress intended its grant of equitable powers to district courts as embodied in section 10(l) of the Act, 29 U.S.C. §160 (l), to be repealed by the recodification of Section 11 of the Norris-LaGuardia Act, 29 U.S.C. §111, into 18 U.S.C. §3692. [Citations omitted.] Hoffman v. I.L.W.U., Local 10, 492 F.2d 929, 934, (9th Cir. 1974)

Of course, as the Hoffman court stated, the purposes of the Taft-Hartley Act differ from those of the Norris-LaGuardia Act. But this general assertion provides no analysis of whether the reasons for having jury trial protections for violations of Taft-Hartley injunctions are analagous to the reasons for having such protections in Norris-LaGuardia situations.

Moreover, despite the Hoffman court's casual assertion to the contrary, there is considerable "reason to believe" that Congress intended Section 3692 to apply to Taft-Hartley injunctions.[22] Section 3692 does not "repeal the equitable powers given to the District Court by Section 10(l) of the Act," but rather gives the accused contemnor the option of having a jury participate in the fact-finding process in those bitterly divided situations where contempt proceedings are instituted. The District Courts retain jurisdiction both to issue labor injunctions (which is all that Section 10(j) and 10(l) of the Taft-Hartley Act intended)[23] and to punish contempts after the fact-finding process is concluded.

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22. See page 15 ff. supra.

23. See pages 24-25 infra.

By authorizing juries in the few cases where contempts arise under the Taft-Hartley Act, Section 3692 does not defeat the purpose of the Act. The Board, the expert federal agency, still determines when to seek preliminary injunctions and when unfair labor practices have been committed. In contrast, the federal jury is asked only to determine "whether individuals or groups did in fact disobey, with requisite knowledge and intent, a court order so as to impose criminal sanctions. The fact situations and evidence involved in such determinations are ordinary grist for the judgment of juries." In re Union Nacional de Trabajadores, 502 F.2d. 113, 119 (1st Cir. 1974).

Thus, the application of Section 3692 to Taft-Hartley injunctions will not frustrate the purposes of the Taft-Hartley Act. However, the failure to apply Section 3692 to Taft-Hartley contempt situations will frustrate the pusposes of Section 3692. Such a construction of Section 3692 would limit the right to a jury trial to contempts arising from a narrow range of injunctions in labor disputes., i.e., to those arising under the Norris-LaGuardia Act. Since the vast majority of injunctions in labor disputes today arise under the Taft-Hartley Act[24] this narrow construction of Section 3692 would in effect confine the right to a jury trial to the fringes of national labor policy. At the core of national labor policy, all of the evils of judge-tried contempts would arise again. As the First Circuit held in a case arising under Section 10(j) of the Taft-Hartley Act:

> ...while jury participation seems as appropriate as ever in criminal contempt proceedings reposing sole dispositive power in the judge who granted the injunction at the request of the Board, would be asked to mete out punishment if he finds that his order has been deliberately flouted. Appropriateness is not enhanced by the judge predetermining, before the extent or seriousness of the disobedience can be fully known, the maximum fines or sentences to be imposed in order to decide whether a jury trial is mandated by the constitution. In re Union Nacional de Trabajadores, 502 F.2d 113, 120 (1st Cir. 1974).

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24. See page 13 supra.

This Court repeatedly has held that even apparently inconsistent labor statutes should be construed to provide the fullest realization of the purposes of each statute. See Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956); Boys Market v. Retail Clerks Local 770, 398 U.S. 235, (1970). As Mr. Justice Brennan stated in a dissent which became the majority in Boys Market:

> ...the two provisions do coexist, and it is clear that they apply to the case before us in apparently conflicting senses. Our duty, therefore, is to seek out that accommodation of the two which will give the fullest possible effect to the central purposes of both. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 216 (1962)

In this case, Section 3692 has two important and fundamental purposes: preserving fairness for accused and legitimacy for the courts. In these turbulent times, the Court should further both purposes by ensuring that the jury trial for labor contempts remains at the center of national labor policy. As its plain words intended, Section 3692 should guarantee to the Petitioners in thise case, and to all accused of violating Taft-Hartley injunctions which arise out of labor disputes, the historic right to a trial by a jury of their peers.

2. *Section 10(h) of the Taft-Hartley Act Does Not Conflict with Granting Accused Contemnors a Right to a Jury Trial.*

In In re Union Nacional de Trabajadores, 502 F.2d 113 (1st Cir. 1974), the National Labor Relations Board argued before the First Circuit that Section 10(h) of the Taft-Hartley Act precluded granting the Petitioner's demand for a jury under Section 3692. This argument, which undoubtedly will be repeated in this Court, fundamentally misunderstands both the purpose of Section 10(h) and the purpose of Section 3692.

Section 10(h) of the National Labor Relations Act, as incorporated into the Taft-Hartley Act provides:

> When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified, or setting apart in whole or in part an order of the Board, as provided in this section, the jurisdiction of the courts sitting in equity shall not be limited by the act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes." 29 U.S.C. §160 (h) (emphasis added)

Section 10(h) simply grants jurisdiction to the United States Courts of Appeals sitting in equity to enforce orders of the National Labor Relations Board without regard to the provisions of the Norris-LaGuardia Act. Section 10(h) was present verbatim in the 1935 National Labor Relations Act, which authorized court action only to enforce Board orders, and it simply was re-enacted as part of the Taft-Hartley Act without significant comment. The Taft-Hartley Conference Report makes explicit the limited purpose of Section 10(h):

> Sections 10(g), (h), and (i) of the present act, concerning the effect upon Board's orders of enforcement and review proceedings, making inapplicable the provisions of the Norris-LaGuardia Act in proceedings before the courts [for enforcement and review] were unchanged by either the House bill or the Senate amendment and are carried into the conference agreement. H.R. REP. No. 510, 80th Cong. 1st Sess. 57 (1947) (emphasis added)

Merely stating this limited purpose illuminates the fallacies of the Board's argument. In the first place, Section 10(h) on its face applies only to proceedings to enforce Board orders in United States Courts of Appeals. Sections 10(j) and 10(l), [29 U.S.C., §§160(j), 160(l) (1970 ed.)], providing

for preliminary injunctions in certain circumstances, and Sections 301 and 208, [29 U.S.C., §§185, 178 (1970 ed.)], providing for national emergency situations all contain their own jurisdictional grants. Thus, whatever effect Section 10(h) may have on the jury right in contempts arising out of violations of Board orders, it is quite simply inapplicable to injunctions obtained under Sections 10(j), 10(l), 301 and 208.

Secondly, since Section 10(h) was a mere re-enactment of the same section in the 1935 NLRA, there is no evidence that it was intended to deprive labor of the fundamental right to a jury trial in contempt situations.[25] In 1948, the Eightieth Congress eliminated any possible misunderstanding by broadening Section 3692 to include all labor contempts and by moving the broader section from the Norris-LaGuardia Act to Title 18. Even if Section 10(h) did apply to Sections 10(l) and 10(j), it only provides that the jurisdiction of the courts will not be affected by the provisions of the Norris-LaGuardia Act. Since Section 3692 does not even purport to limit the jurisdiction of the court, and since it is not part of the Norris-LaGuardia Act, Section 10(h) does not limit the effect of Section 3692.

Finally although Amicus would contend that Section 3692 provides for a jury trial in all contempts arising out of labor injunctions, it is especially clear that in cases of criminal contempt of a labor injunction, the accused is statutorily entitled to a trial by a jury of his peers. 18 U.S.C. §3692; In re Union Nacional de Trabajadores, 502 F. 2d 113 (1st Cir. 1974). A criminal contempt proceeding does not enforce an order; but rather vindicates the authority of the court by punishing the contumacious party. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444-445 (1911). It is not part of the original equitable cause of action, but rather is an independent action at law and "no part of the original cause." Michaelson v. United States, ex rel. Chicago, St. P., M. & O. Ry., 266 U.S. 42, 64-65 (1924).

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25. See pages 14, 25 supra.

Section 10(h) makes inapplicable the provisions of the Norris-LaGuardia Act when a court sits in equity for "granting . . . a restraining order, or . . . enforcing, modifying, and enforcing as so modified, or setting aside . . . an order." 29 U.S.C. §160(h). Since criminal contempts are not equitable actions and since they are not for the purpose of "enforcing" the order, Section 10(h)'s limitations are not applicable to criminal contempt proceedings. In re Union Nacional de Trabajadores, 502 F.2d 113 (1st Cir. 1974).

The facts of the instant case raise the question of jury trials only in relation to criminal contempt proceedings arising out of labor injunctions, and therefore call upon this Court to rule solely upon this specific issue. Section 10(h) of the Taft-Hartley Act is clearly not applicable to criminal contempts.

II. PETITIONER UNION WAS CONSTITUTIONALLY ENTITLED TO A JURY TRIAL BECAUSE OF THE INTRINSICALLY SERIOUS NATURE OF THE OFFENSE AS WELL AS THE SEVERE NATURE OF THE PUNISHMENT IMPOSED.

A. Although All Criminal Contempts May Not Be Intrinsically Serious By Constitutional Standards, Particular Contempts May Be Deemed Serious On the Basis of Either the Nature of the Punishment or the Nature of the Offense.

In recent years, this Court has relied exclusively on the nature of the punishment in determining whether particular offenses are serious or petty, and therefore, triable by jury. The criterion usually employed in conventional criminal prosecutions is the statutorily established maximum punishment. See, e.g. Baldwin v. New York, 399 U.S. 66 (1970); Duncan v. Louisiana, 391 U.S. 145 (1968).

However, in cases of criminal contempt, since there is usually no statutorily established maximum punishment, the Court has relied instead on the actual punishment imposed. See, e.g. Taylor v. Hayes, 94 S. Ct. 2697 (1974); Codispoti v. Pennsylvania, 94 S. Ct. 2687 (1974); Frank v. United States, 395 U.S. 147 (1969); Bloom v. Illinois, 391 U.S. 194 (1968); Cheff v. Schnackenberg, 384 U.S. 373 (1966). But cf. Dyke v. Taylor Implement Co., 391 U.S. 216 (1968). A statutory maximum punishment is regarded as an "objective criteri[on] reflecting the seriousness with which society regards the offense." Baldwin, 399 U.S. at 68. In contrast, the actual punishment imposed in most criminal contempt cases, where there is no statutory maximum, while admittedly a far less reliable and far less objective indication of the seriousness of the offense, is nonetheless relied on as the "best evidence" available. Duncan, 391 U.S. at 162, n. 35.

In practice however, the judge rules on the alleged contemnor's demand for jury trial at the beginning of the proceeding, whereas sentence is not imposed until the end. As a result the judge is concerned primarily with setting a sentence which is permissible within the constraint of the prior jury ruling and hardly provides an objective indication of the seriousness of the offense.

Amicus submits that the actual sentence imposed need not be relied on in the instant case because of the availability of another criterion which provides a far more reliable, far more objective indication of the seriousness of the instant offense-- i.e. its inherent "moral" nature, particularly whether it was malum in se and triable by jury at common law. This criterion has traditionally been employed by this Court in determining the existence of a right to jury trial in both criminal and civil cases. See, e.g. Pernell v. Southall Realty, 94 S. Ct. 1723 (1974).

Some of the earlier conventional criminal cases to come before the Court were decided exclusively on the basis of the inherently "evil" nature of the offense. Callan v. Wilson, 127 U.S. 540, 555-56 (1888) involved a union member tried without a jury for the misdemeanor of unlawfully combining to impose a boycott. The Court held that, notwithstanding its present misdemeanor status, this offense constituted the serious common law crime of conspiracy, and therefore that Callan's demand for a jury trial should have been honored. Similarly, in District of Columbia v. Colts, 282 U.S. 63, 73 (1930) the Court concluded that "driving to endanger" constituted the indictable common law crime of public nuisance, and ruled that Colts was entitled to a jury trial.[26]

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26. Having concluded that Colts was entitled to a jury trial solely on the basis of the serious common law nature of the offense, the Court declined the government's invitation to consider the comparatively trivial statutory maximum penalty ($100 fine or 30 days imprisonment). The Court thereby rejected, sub silentio, the Government's argument that such an allegedly trivial penalty rendered the offense petty by contemporary standards, no matter how serious it may once have been on the basis of common law standards. See Colts, 282 U.S. 67, 68 (Argument for Petitioner).

In two other relatively early cases, Schick v. United States, 195 U.S. 65 (1904), and District of Columbia v. Clawans, 300 U.S. 617 (1937), the Court concluded that respective violations of an oleomargarine statute and a licensing statute were not of an inherently serious nature (i.e. malum in se), but only malum prohibitum. Thus, the Court went on to consider the second criterion - the severity of the authorized punishment. While indicating that the severity of the punishment might render an otherwise petty offense serious, the Court concluded that respective authorized maximum punishments of a $50 fine, and a $300 fine or 90 days imprisonment, were not sufficiently severe to have such an effect in those two cases.[27]

It was not until more recent years that two conventional criminal cases reached the Court in which the authorized punishment was deemed sufficiently severe to mandate a conclusion that the offenses were serious rather than petty. See, Duncan v. Louisiana, 391 U.S. 145 (1968) (maximum of two years imprisonment); Baldwin v. New York, 399 U.S. 66 (1970) (maximum of one year imprisonment; six month rule established for other cases).

Although Baldwin suggests that the authorized maximum penalty has today become the "most relevant" criterion of the seriousness of an offense,[28] it also reaffirms the continuing relevancy of the nature of the offense as an alternative criterion:

Similarly, in Callan v. Wilson, 127 U.S. 540, once the Court concluded that the offense was serious by common law standard it ceased further inquiry. The decision contains no indication of the statutory maximum penalty, nor is there any discussion of the relatively trivial sentence actually imposed--a $25 fine, or, in default thereof, 30 days imprisonment.

27. Thus the Court did accept the converse of the argument rejected in Colts, note 26, supra, that is, a severe punishment may render an otherwise petty offense serious; but a trivial punishment may not render an otherwise serious offense petty.

28. Baldwin v. New York, 399 U.S. at 68:

> [W]e have sought objective criteria reflecting the seriousness with which society regards the offense [Clawans], and we have found the most relevant such criteria in the severity of the maximum authorized penalty. (emphasis added)

> Decisions of this Court have looked to both the nature of the offense itself, as well as the maximum potential sentence... Baldwin v. New York, 399 U.S. at 69, n.6 (emphasis supplied).[29]

Similarly, in the criminal contempt cases, notwithstanding the emphasis on the actual sentence imposed, the Court has also considered "the nature of the offense," concluding:

> Criminal contempt, intrinsically, and aside from the particular penalty imposed, was not deemed a serious offense requiring the protection of the constitutional guarantees of the right to a jury trial. Bloom v. Illinois, 391 U.S. at 196-197 (emphasis supplied).

This general statement may be accurate with respect to the vast majority of cases, in which criminal contempt merely constitutes "an offense sui generis" (i.e., malum prohibitum). Cheff v. Schnackenberg, 384 U.S. at 380.[30]

But the Court, in the following interpretation of Cheff, has also recognized that:

Cf. Colts, 282 U.S. at 73, expressing an earlier view of the most relevant criterion:

> Whether a given offense is to be classed as a crime, so as to require a jury trial, or as a petty offense, triable summarily without a jury, depends primarily upon the nature of the offense. (emphasis added)

29. Justice Harlan, although dissenting from most of the Court's decision, also recognized that "the nature of the offense and the severity of punishment are two distinct considerations." Baldwin v. New York 399 U.S. at 121, n. 7. See also, Id. at 120 (petty - serious distinction seen as rooted in the common law).

30. In Cheff, the offense consisted of the violation of a Circuit Court of Appeals injunction enforcing a cease-and-desist order of the F.T.C. pending review.

> [C]riminal contempt [is] an offense applied to a wide range of conduct including conduct not so serious as to require jury trial absent a long sentence. Duncan v. Louisiana, 391 U.S. at 162, n. 35 (emphasis supplied. See also, Frank v. United States, 395 U.S. 147 (1969).[31]

Although most of that "wide range of conduct" constituting criminal contempt is of the "not so serious" variety, described in the above quote from Duncan, the Court has left open the possibility that in an appropriate case, the contemptuous conduct might be so inherently serious as to require a jury trial (as was the case in Callan v. Wilson, 127 U.S. 540 and District of Columbia v. Colts, 282 U.S. 63.) Amicus submits that the alleged contemptuous conduct in the instant case is quite serious indeed, and therefore the Court should now consider the question left open since Duncan: may the serious nature of particular contemptuous conduct be sufficient to trigger the right to jury trial? This point will be discussed immediately below.

B. *The Instant Offense, Consisting of a Combination of Workers, is of an Inherently Serious Nature, and Should Have Been Tried by Jury.*

The conduct alleged in the instant case is a combination of workers to impose a boycott. Within the confines of the present-day comprehensive, statutory system of administrative and judicial regulation, which originated in the Norris-LaGuardia and Wagner Acts of the 1930's, this conduct is deemed a criminal contempt because it violates an injunction issued by a District Court Judge.

However, before the regulation of labor relations was pre-empted by statute, this same conduct would have been

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31. In Frank, after referring to the same footnote of Duncan, quoted p. 31 , supra, the Court noted:

> But a person may be found in contempt of court for a great many different types of offenses, ranging from a disrespect for the court to acts otherwise criminal. 395 U.S. at 149 (emphasis added)

regulated by a common law criminal conspiracy prosecution, or a common law civil injunction proceeding, combined with summary, non-jury contempt. Moreover, these historic precedents still provide an objective indication of the "seriousness with which society regards the offense," Baldwin, 399 U.S. at 68, quoted note 30, supra, and also provide evidence that summary contempt proceedings were first applied to combinations of workers in a deliberate attempt to bypass the right to jury trial, which may be unconstitutional. (See pages infra).

1. *The Alleged Combination of Workers Constituting the Instant Contempt Also Constitutes the Serious Offense of Criminal Conspiracy, Which Was Triable by Jury at Common Law.*

At common law, combinations of workers were regarded as criminal conspiracies. See, generally, SAYRE, Criminal Conspiracy, 35 HARV. L. REV. 393 (1922). Although one historian has found evidence of a criminal conspiracy prosecution against workers in New York City in 1741,[32] the 1806 Philadelphia Cordwainers' Case[33] appears to be the first reported case, and is generally regarded as the first American labor case of any type.[34] Eight leaders of the striking cordwainers were indicted and arrested on the charge of conspiring to raise their wages. This had the desired effect of breaking the strike. NELLES, The First American Labor Case, 41 YALE L.J. 165, 168(1931). They were subsequently tried by a jury, found guilty, and fined $8 each. Id., at 193.

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32. BONNETT, THE ORIGIN OF THE LABOR INJUNCTION, 5 SO. CAL. L. REV. 105, 113, (1931). The defendants were journeymen bakers, who combined for the purpose of raising wages. The charges were instigated by the master bakers who employed them.

33. 3 COMMONS & GILMORE, DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY, 59-248 (1910).

34. See, e.g., NELLES, The First American Labor Case, 41 YALE L. J. 165 (1931); COX & BOK, CASES AND MATERIALS ON LABOR LAW, 22 (7th Ed. 1969).

Notwithstanding some decisions limiting their use,[35] criminal conspiracy prosecutions continued throughout the nineteenth century and into the early twentieth century.[36] For example, in 1888 this Court concluded that a combination to impose a boycott constituted a criminal conspiracy, which was deemed an inherently serious offense, mandating a jury trial upon demand. Callan v. Wilson, 127 U.S. 540 (1888).[37]

2. *The Use of Summary Contempt Proceedings in Cases Involving Combinations of Workers Originated as a Deliberate Attempt to Bypass the Common Law Right to Jury Trial and Must Now be Regarded as Unconstitutional.*

By the last quarter of the nineteenth century the criminal conspiracy prosecution had outlived its usefulness to employers. During the period from the Philadelphia Cordwainers' Case (1806) to the late 1870's, the likelihood of conviction in such cases diminished substantially.

In 1806 American juries were composed of propertied aristocrats who were generally hostile to the working classes, and therefore more than ready to return guilty verdicts.[38] However, by the late 1870's and beyond, the composition of both the electorate and juries had been significantly democratized. There had also been a dramatic shift in public opinion. The emerging industrial giants and railroad monopolies were seen as the evil of the day. And the cause of the emiserated working classes

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35. See, e.g., Commonwealth v. Hunt, 4 Metc. (Mass.) 111 (1842) (combination must be for unlawful p urpose); Cf. State v. Donaldson, 32 N.J.L. 151 (1967) (Combination for "oppresive" purpose; conduct not otherwise illegal).

36. See, e.g., State v. Dalton, 134 Mo. App. 517, 114 S.W. 1132 (1908), and discussion in SAYRE, 35 HARV. L. REV., supra p. 32, at 415-416.

37. In Callan the boycott was imposed when union members refused to work with a fellow union member. In the instant case the boycott was imposed when members of petitioner union, who were secondary employees, refused to deliver newsprint to the primary employer.

38. See SAYRE, Criminal Conspiracy, 35 HARV.L.REV. 413-414 (1922)

had become not only respectable, but even noble. United States Senators defended workers charged with conspiracy without fee. William McKinley (later President McKinley) was elected to Congress for the first time in 1876 after having acted as voluntary defense counsel for striking mineworkers charged with rioutous assault. In sum, the climate was such that it was very difficult to rely on juries to return any convictions against workers for union activities.[39]

Thus by the time of the Railway Strike of 1877 employers needed a new way to manipulate the law (and courts) against the workers— a way which would eliminate the role of the now-mischievous jury. And of course, the answer was found in the system of civil injunction, coupled with summary, non-jury contempt.[40]

Whatever objections labor may have had to the use of criminal conspiracy prosecutions, at least they provided the significant safeguard of trial by jury. In contrast, the system of injunction-contempt eliminated this one safeguard. Thus labor's opposition to the injunction and non-jury contempt was far more vigorous than its opposition to the criminal conspiracy prosecution. See, e.g, the comments of Samuel Gompers, supra, p. 8 .

Labor first attempted to attack the injunction-contempt system, with its deliberate bypass of the jury trial, in the courts. But as might have been expected in the prevailing judicial climate, the courts, including this Court, were unwilling to conclude that this usurpation of jury trial was unconstitutional. See, In Re Debs, 158 U.S. 564 (1895).[41]

In Debs the Court concluded that the bypass of jury trial was justified for the following reason:

> To submit the question of disobedience to

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39. See NELLES, A Strike and Its Legal Consequences--An Examination of the Receivership Precedent for the Labor Injunction. 40 YALE L. J. 507, 518-20, 529 (1931).

40. See generally, NELLES, 40 YALE L. J., supra, note 40; BONNETT, 5 SO.CAL. L.R. , supra, note 41; FRANKFURTER & GREENE, THE LABOR INJUNCTION, supra, p.

41. Labor then turned to a legislative approach which culminated in the enactment of the Norris-LaGuardia Act 36 years later. See discussion supra, pp. 9-12.

another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency. 158 U.S. 595.

Notwithstanding Debs, during the twentieth century this Court has gradually extended the full panoply of due process rights to alleged criminal contemnors, including most recently, the right to jury trial. See, Bloom v. Illinois, 391 U.S. at 204-06. In the process, the Court has also explicitly repudiated the foregoing analysis in Debs, concluding that neither "efficiency" nor "the desirability of vindicating the authority of the court" were sufficient grounds for depriving alleged contemnors of their constitutional right to jury trial. Bloom, 391 U.S.at 208.

Amicus therefore submits that judged by today's standards, the deliberate bypass of jury trial in Debs, in the interest of "efficiency," effected through the use of summary contempt, would be unconstitutional. And this is not merely an academic matter; for if this Court should reject the statutory argument in the instant case, the constitutional question again emerges because workers are being criminally prosecuted for activities which were triable by jury at common law.

3. *Workers Charged With Combining to Impose a Boycott are Entitled to a Jury Trial Regardless of the Form of the Proceeding in Which Criminal Sanctions Are Sought to Be Imposed.*

In effectively overruling the jury trial holding in Debs, this Court belatedly recognized that there is no practical distinction between convictions for ordinary crimes and convictions for criminal contempt:

> In modern times, procedures in criminal contempt cases have come to mirror those used in ordinary criminal cases. Our experience teaches us that convictions for criminal contempt, not infrequently resulting in extremely serious penalties, see United States v. Barnett...(Goldberg J., dissenting), are indistinguishable from those obtained under ordinary criminal laws. If the right to jury trial is a

> fundamental matter in other criminal cases, which we think it is, it must also be extended to criminal contempt cases. Bloom v. Illinois, 391 U.S. at 207-8 (emphasis added).[42]

Before reaching the above-quoted conclusion in Bloom, the Court had noted that criminal contempt proceedings and ordinary criminal proceedings served the same ultimate function: "protection of the institutions of our government and enforcement of their mandates." 391 U.S. at 201. This was especially true when the "criminal contemptuous conduct may violate other provisions of the criminal law," but it was also true "even when this is not the case." Id., 391 U.S. at 201.

Thus Amicus submits that the conduct alleged in the instant case doubly qualifies as a serious offense, because it constitutes a common law criminal conspiracy to impose a boycott, Callan v. Wilson, 127 U.S. 540 (1888), and also a criminal contempt, because it involves disobedience of a court order. Moreover, these two aspects should be viewed cumulatively and not in isolation. If the conduct involved in the instant case constitutes a serious common law offense, as it does, it would be fairly ironic to suggest that because it also constitutes criminally contemptuous disobedience of a court order that it is somehow rendered less serious or less of a crime. If anything, this dual aspect of the conduct renders it more serious.

Nor may it be argued that society today regards a combination to impose a boycott as a less serious offense than it may have been at common law. A similar argument was rejected by this Court in District of Columbia v. Colts, 282 U.S. 63 (1930) where the government suggested that the trivial modern day penalties for driving to endanger deprived that offense of its serious common law nature. Also, whatever merit such an argument might have when the combination to impose a boycott is treated in a civil administrative or judicial proceeding, the argument loses

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42. The two justices who dissented in Bloom did so on the ground that the Court's concepts of due process should not be imposed on a state court proceeding. They apparently agreed that such due process requirements could properly be imposed in a federal court proceeding as in the instant case.

any such merit when criminal sanctions (including constitutionally serious sanctions) are sought to be imposed in a criminal proceeding such as that in the instant case. And it little matters whether that criminal proceeding be labeled as one for "criminal contempt" or an "ordinary crime." For as Justice Black once noted:

> Nor do I take any stock in the idea that by naming an offense for which a man can be imprisoned a "contempt," he is any the less charged with a crime. Frank v. United States. 395 U.S. at 160 (dissenting opinion).

That is also the lesson of Bloom v. Illinois.

When the Philadelphia Cordwainers were tried for combining to raise their wages in 1806, they received a jury trial before being fined $8. When union member Callan was tried for combining to impose a boycott, and fined $25, this Court held, in 1888, that he should have been granted a jury trial upon demand. So too today, where the instant offense also consists of a combination to impose a boycott, resulting in a $25,000 fine, this Court should hold that there was a right to trial by jury, even though the proceeding was nominally for criminal contempt rather than criminal conspiracy. For nothwithstanding the label applied to the proceeding, the underlying conduct is equally serious, and so are the consequences to the offender.[43]

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43. Apart from the serious common law nature of a combination of workers, and the severity of the actual punishment imposed, there are other objective indications of the "seriousness with which society regards the offense," Baldwin, which also lead to the conclusion that the offense is serious.

The right of workers to combine together is essential to their economic well-being, and constitutes their only effective way of dealing with management from a position of strength. See, e.g. American Steel Foundries v. Tri-City Trades Council, 257 U.S. 184 209 (1921); 29 U.S.C. § 151 Notwithstanding the common law restrictions against such combinations, the right of workers to engage in concerted activities is now recognized as the cornerstone of our national labor policy. See 29 U.S.C. §§ 151, 157.

Moreover, as demonstrated in Argument I, supra, for the last 60 years Congress has recognized that the judiciary's powers of injunction and summary contempt, when abused, constitute a marked threat to labor's right to engage in concerted activities. Congress has therefore limited the courts' jurisdiction to issue labor injunc-

C. *The $25,000 Fine Imposed on Petitioner Union Rendered the Offense Serious, and a Jury Trial Was Therefore Required.*

Whatever difficulties this Court encountered in drawing the line between serious and petty offenses in state court proceedings, there have been no such difficulties in drawing the line for federal court proceedings. For unlike the situation in Duncan, "where the legislature has not addressed itself to the problem," 391 U.S. at 160, Congress has addressed itself to the problem in 18 U.S.C. § 1, and drawn the line at six months imprisonment or a $500 fine. See Duncan, 391 U.S. at 161, see also, Frank v. United States, 395 U.S. at 150, n. 3, 150-1; Cheff v. Schnackenberg,[44] 384 U.S. at 379; In re Union Nacional de Trabajadores, 502 F.2d 113, 116 (1st Cir. 1974); United States v. R.L. Polk & Co., 438 F.2d 377 (6th Cir. 1971).

The judgment that the fine "might have no deterrent or punitive effect at all," 492 F. 2d 936, and is therefore

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tions, except in cases involving specified unlawful conduct; but even then, this power has been carefully regulated and subject to procedural protections such as the right to jury trial upon demand, which eliminates the powers of summary contempt.

Although this Court has sometimes construed these statutes in a narrow manner, e.g. Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) and may do so again in the instant case by rejecting the statutory argument (part I, supra,), it is nonetheless apparent that Congress regards labor's alleged participation in unlawful concerted activities as sufficiently serious to warrant trial by jury in most, if not all cases of contempt.

And this has been true even though the punishment imposed in many of these cases, including such celebrated cases as In re Debs, 158 U.S. 564 (1895) (imprisonment of three to six months) and Gompers v. United States 233 U.S. 604 (1914) (30 days imprisonment and $500 fines), is not serious, even by today's more liberal constitutional standards.

Any punishment imposed on a labor union may be sufficiently serious to tip the delicate, Congressionally-established balance between capital and labor. Labor's ability to engage in concerted activities may be seriously undercut by fines, or even the short imprisonment of union leaders at a crucial point in a strike. See, e.g. Philadelphia Cordwainers' Case, supra, p. 32. Thus in the many instances in which Congress provided procedural protections against summary contempt proceedings, it has done so across the board, without regard to the possible punishment.

44. The court below discussed only one of these three Supreme Court cases indicating that 18 U.S.C. § 1 defines the line

not serious, should be the decision of the legislature and not of the courts.

In criminal contempt proceedings the judge already has the combined powers of judge and prosecutor. In addition, through manipulation of the sentence imposed the judge may also exercise the powers of the jury. But heretofore the sentence could only be manipulated within the limits of the objective standards of 18 U.S.C. § 1. If this Court should adopt the subjective test employed by the court below, the existing possibilities for abuse, noted by this Court in Bloom v. Illinois, 391 U.S. at 202, will be substantially increased. A judge's finding that a particular fine imposed on a union or corporation in excess of $500 is not a deterrent, or not punitive, will be insulated from any meaningful judicial review; for most appellate courts will no doubt conclude, as did the court below, that this finding of fact is not clearly erroneous. 492 F. 2d 937. Amicus submits that such a result should not be permitted unless Congress, rather than this Court, chooses to amend 18 U.S. C. § 1 to adopt the method employed by the court below. Until then, 18 U.S.C. § 1 should be strictly construed as it is written--drawing the petty-serious line for all federal cases at six months imprisonment or a $500 fine. Judged by this objective standard, the alleged offense of petitioner union, resulting in a $25,000 fine, must be deemed serious, and the demand for jury trial should have been granted.

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between serious and petty offenses in federal proceedings--i.e. Cheff, which admittedly referred only to the period of imprisonment in the statute, but not the fine. 492 F. 2d 936. The court below ignored this far more clearer statement in Frank:

> Therefore, the maximum penalty authorized in petty offense cases is not simply six months imprisonment and a $500 fine. A petty offender may [also] be placed on probation for up to five years ... 395 U.S. 150-151 (emphasis added)

The court below also disregarded similarly clear language in Duncan:

> In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500 fine, 391 U.S. 161 (emphasis added).

CONCLUSION

The question before the Court has profound implications: will the historic right to a jury trial for one accused of conduct violating a labor injunction be confined to the fringes of the nation's labor law, or will that right be placed, where it belongs, at the center of the national labor policy?

If the national labor statutes are interpreted to confine the jury right to the now obsolescent forms of injunctions issued under the Norris-LaGuardia Act, the unfairness as well as the appearance of unfairness of judge-tried contempts will arise again. Since the Taft-Hartley injunctions in many cases duplicate those available prior to the Norris-LaGuardia Act, these evils will be as widespread as they were before 1932.

This Court should avoid such a narrow statutory construction because it produces an unconstitutional result. The use of summary contempt to bypass the constitutionally mandated right to jury trial for serious offenses threatens the very basis of the guarantees which in this century have been extended to both labor and to criminal defendants.

In these turbulent times, this Court should extend the statutory and constitutional protection of a jury trial to that narrow range of bitterly contested cases which result in contempt citations under the Taft-Hartley Act. As Senator Walsh said long ago, a jury verdict in such cases "would silence the caviling and strengthen in the minds of the people the conviction that the courts are indeed the dispensers of justice and not engines of oppression."45

45. FRANKFURTER & GREENE, THE LABOR INJUNCTION, supra, p. 192.